IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 35 OF 2004.

Raju Khadaka,
Central Jail, Aguada. .... Appellant.

Versus

S T A T E,
Through Public Prosecutor,
Panaji, Goa. .... Respondent.

Shri J.A. Lobo, under Legal Aid Scheme for the Appellant.

Shri S.N. Sardessai, Public Prosecutor for the State/Respondent.

CORAM: N. A. BRITTO, J.

DATE: 14th SEPTEMBER, 2005.

J U D G M E N T:

This appeal is by the convicted accused in Special Criminal Case No.40/2001 who has been sentenced under Section 20(b)(C) of the N.D.P.S. Act, 1985 (Act, for short) to undergo R.I. for a period of ten years and to pay a fine of Rs. 1 lakh and in default to undergo one year S.I.

2 The facts of the case against the accused are that on 23.10.01 at about 19.20 hrs. P.W.5 Gundu Naik who was then attached to the Calangute Police Station as P.S.I. received specific and reliable information that a young Nepali person aged about 25-30 years having long hair tied at

the back and wearing a T-shirt with white and brown dots and a light khaki colour shining pant would be coming at Baga, Calangute near box bridge with a consignment to deliver to his customer at about 20.30 hrs. which information was reduced by him in writing and sent to P.W.8 Arvind Gawas, S.D.P.O., Mapusa through the then P.I. P.W.7 Deu Banaulikar. P.W.7 Deu Banaulikar and P.W.8 Arvind Gawas have confirmed the receipt of the said information under Section 42 of the Act and by the latter at about 8 p.m. P.W.5 Gundu Naik then secured the presence of two panchas including P.W.4 Sandip Korgaonkar and along with the raiding party which included P.I. Banaulikar/P.W.7 as well, they left for Baga, at about 20.00 hrs. after P.W.5 Gundu Naik having requested P.I. Banaulikar in writing to carry with him the seal of the police Station. At Baga they concealed their presence and at about 20.30 hrs. they saw a person with the description which matched with the given information and when the accused came they rushed towards him and the accused got confused and said " Kya hai kya hai" whereupon P.W.5 Gundu Naik identified himself by showing his identity card and introduced the panch witnesses and the members of the raiding party to the accused who gave his name as Raju, son of Kumarsingh Khadka. P.W.5 Naik then told the accused about the said information and further informed him that he had a right to be searched either in the presence of a Magistrate or Gazetted Officer of his choice if he so desired and when the accused declined the said offer P.W.5 Gundu Naik asked the

accused that he could take a search of the raiding party and the panch witnesses which offer the accused again declined. P.W.5 Gundu Naik asked the accused to open the polythene bag which he was carrying and he did so and in the said bag three rectangular slabs wrapped in polythene wrapper, 26 flat round substances individually in polythene bag and 7 oval shape pieces wrapped in transparent polythene bag were found which gave the odour of charas and when they were weighed they were found to be 1.800 kgs. and the same were put in a transparent polythene bag carried by them and sealed which was then inserted in a light green colour envelope with cloth lining inside and was packed and sealed with 7 seals of Calangute Police Station and upon the personal search of the accused the accused was found with cash of Rs.3080/- in the right hand side pant pocket and an identity card in the name of the accused issued by Tribhuvan University, Kathmandu which were packed and sealed separately and the carry bag having name 'Sky King Tailor Shapora ' was folded and also packed and sealed and a seizure report and a panchanama were prepared and the accused was placed under arrest after the accused disclosed that he had no legal document to support the possession of the said drugs and copies of the seizure report and panchanama were given to the accused under acknowledgment. P.W.5 Gundu Naik on return to the Police Station handed over the exhibits to Writer P.C. Umesh Shet/P.W.6 who has confirmed the same in his evidence, having received the same at about

22.30 hrs. P.W.6 Umesh Shet has further confirmed that he made an entry of the said 4 sealed envelopes on the muddemal register and kept the same in his custody and the keys were in his exclusive custody. P.w.6 Umesh has stated that on the next morning he took the sealed envelope containing 1.800 kgs. of charas along with the letter addressed to S.P., C.I.D., as well as the letter addressed to the Drugs Controller, Panaji and handed over the same to the Scientific Assistant namely P.W.2 Chandrakant Chowgule who was looking after the said work in the absence of P.W.3 Krishna Shetgaonkar, under acknowledgment. P.W.2 Chandrakant has confirmed having received the exhibits from P.W.6 Umesh Shet and has also confirmed having received the letter addressed to the Superintendent of Police (Crime Branch) and the sealed enveloped was stated to be containing 1.800 kgs. of charas in sealed condition in addition to a letter addressed t the Drugs Controller which he inwarded in his office and then delivered the sealed parcel under a letter signed by Dy.S.P. Bosco George to the Laboratory where it was examined by P.W.1 Mahesh Kaissare who submitted his report which was produced at Exh.9 P.W.1 Kaissare after analysis found that the substance analysed was charas. P.W.3 Krishna Shetgaonkar on his return was handed over the letter received from the Director of Food and Drugs Administration by which Report No.28/N/2001 was forwarded with instructions to collect the balance of the sample which he collected and handed over to P.I., Calangute Police Station on 6.12.01.

3. The learned Special Judge after considering at length the evidence of the aforesaid witnesses, including that of P.W.4 Sandip Korgaonkar who was panch witness to the panchanama, came to the conclusion that the prosecution had established its case beyond reasonable doubt that the accused was found in possession of 1.800 kgs. charas which was now declared to be commercial quantity and which entailed minimum punishment of ten years and fine of Rs 1 lakh and proceeded to award the same to the accused.

4. At the hearing of this appeal, Shri Lobo, the learned counsel on behalf of the accused has submitted that P.W.5 Gundu Naik the then P.S.I. could not have obtained such detailed and specific information and the receipt of such information itself should be looked upon with suspicion and in this context Shri Lobo has placed reliance on the case of ***Fulkumar Suratsingh Sigrahwa v. State of Maharashtra (2005 (2) Crimes 193).*** That was a case where the information was given at 9.00 a.m. That is 5 hours before the raid and the Court held that it would be impossible to believe that the informant would have known what clothes the accused would be wearing in the afternoon at 3.00 p.m., or that the accused would be carrying a tin box on his shoulder. The latter part of the information, the Court found, created a doubt, observing that it was difficult to understand

that unless one assumes that the informant had some sixth sense to see in the future as to how the accused was going to carry a tin box on his shoulder and that one could not assume that an informant would have such a power to know such details and the only explanation was that the information was recorded after the raid was carried out. In my view, the observations of this Court in the case of Fulkumar Suratsingh Sigrahwa (supra) do not have any relevance to the facts of this case. The information received in this case was at 19.20 hrs. as stated by P.W.5 Gundu Naik and was recorded at Exh.47 Colly. and the information was that the said Nepali person of the given description would be coming at 20.30 hrs. with particular type of clothes and in fact pursuant to that information, the accused was apprehended at about 20.30 hrs. i.e. almost after an hour or so. I find that there is nothing incredible about the said information. The Police are bound to have their own sources from which they can gather or collect such information and considering the facts of this case there is no reason to conclude that the information was recorded subsequent to the arrest of the accused, which fact has been otherwise deposed to, and the fact that it was received as stated by P.W.5 Gundu Naik, has been confirmed by him as well as P.W.7 P.I. Deu Banaulikar and P.W.8 S.D.P.O. Shri Arvind Gawas. I am therefore not inclined to accept the submission of Shri Lobo that in this case there has been non-compliance of Section 42 of the Act.

5. The next submission of Shri Lobo is that Section 50 of the Act has not been complied with. Section 50 of the Act provides that when a duly authorised officer is about to search a person and if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate for the purpose of search. Shri Lobo has submitted that P.S.I. Naik did not convey exactly to the accused in Hindi that he had a right to be searched before a Gazetted Officer or a Magistrate if he so desired and that the accused did not understand the exact meaning of that offer. In this context, Shri Lobo has referred to the evidence of P.W.4 Korgaonkar, the panch witness and P.W.5 P.I. Gundu Naik. P.W.4 Korgaonkar stated that P.S.I. Naik had told the accused that a Magistrate or a Gazetted Officer could be called for taking his search, but the accused replied saying "nahi mangta ". In cross-examination P.W.4 Korgaonkar was unable to recall the exact words used in hindi by the accused to decline the offer to be searched before a Magistrate or a Gazetted Officer. P.W.4 Korgaonkar further stated that he was unable to reproduce the exact words and that he also did not remember whether the offer made by P.W.5 P.S.I. Naik was recorded in Hindi in the panchanama. P.W.5 P.S.I. Gundu Naik in his cross-examination stated that the accused had declined the offer by stating "nahi chahiye", but at

the same time he stated that the conversation between the accused and himself was in Hindi language and not only that, he had used the words Magistrate and Gazetted Officer whilst explaining the offer though he knew the corresponding meaning of the said words as 'Rajpatri Adikari and Niyadandidayakari' and had ensured that the accused had understood its meaning. In my view it was certainly not expected of P.W.4 Korgaonkar with the passage of time to have reproduced the exact words used by accused when the accused declined the said offer, that he could be searched before a Magistrate or a Gazetted Officer. Shri Lobo submits that the divergence of words “nahi mangta” as stated by P.W.4 Korgaonkar and “nahi chahiye” as stated by P.W.5 P.S.I. Naik shows that the offer was not made at all. I am not inclined to accept the said submission. The words 'nahi mangta' and 'nahi chahiye' are commonly used whilst speaking colloquial hindi and whether the accused used one or the other expression would be insignificant as long as the evidence shows that the offer was made and was declined by the accused. The said discrepancy in reproducing the exact words after passage of time is too slight or insignificant to doubt that the panchanama was not done on the site or for that matter in the presence of P.W.4 Sandip Korgaonkar, who otherwise has well stood the test of cross-examination and proved himself to be a reliable witness. The fact that P.W.5 Naik had his telephone number and called him on phone, is not sufficient to discard

the evidence of P.W.4 Korgaonkar. The requirement of informing the suspect of his right to be searched under S.50 of the Act has come up for consideration before the Apex Court on several occasions. In the case of ***Joseph Fernandez v. State of Goa (2003 (10) Scale 419)*** the Apex Court has stated in that case that P.W.8 had deposed that she had told the appellant that if he wished he could be searched in the presence of the Gazetted Officer or a Magistrate to which the appellant had not favourably reciprocated and the said offer was a communication about the information that the appellant had a right to be searched and was substantial compliance with the requirement of S.50. In the case of ***Prabha Shankar Dubey v. State of Madhya Pradesh (2003 A.I.R. SCW 6592)*** the Court took note of its earlier Constitution bench decision in the case of ***State of Punjab v. Baldev Singh [(1999) 6 SCC 172]*** and stated that there is no specific form prescribed or intended for conveying the information required to be given under S.50. What is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in presence of one of the officers named in the section itself. Since no specific mode or manner is prescribed or intended, the Court has to see the substance and not the form of intimation. Whether the requirements of S.50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or strait-jacket formula. In

my view the evidence of P.W.4 Korgaonkar and P.W.5 P.S.I. Naik is more than sufficient to conclude that the requirements of S.50 of the Act were complied with in this case.

6. The next submission of Shri Lobo is that the weight of the sample as found by P.W.1 Kaissare creates a doubt on the veracity of the case of the prosecution. Indeed, according to P.W.5 P.S.I. Naik the weight of charas found with the accused was 1.800 kgs. P.W.1 Kaissare in his analytical report (Exh.9) gave the weight of the 3 squarish rectangular shape slabs as 1.315 grams, but forgot to mention the weight of 26 flat circular pieces. P.W.1 Kaissare also mentioned the weight of 7 (5 oval shape and 2 squarish shape) pieces as 104.40 gms. However in his evidence P.W.1 Kaissare gave the weight of 26 flat circular pieces as 370 grams which he conceded was not mentioned in his report. The defence chose not to cross-examine the P.W.1 Kaissare on any of the aspects of his report and it is quite probable that in case he had forgotten to mention by oversight the weight of the 26 circular pieces, he subsequently gave the weight of the same as 370 grams. The weight as found by P.W.1 Kaissare, separately prior to carrying out the analysis works out to 1.789.40 grams i.e. 10.6 gms. Short. As far as the weighing by P.W.5 P.S.I. Gundu Naik is concerned, he has stated that he had used a balance with two pans, each pan having a 6” diameter and had used weights of 1 kg., 500 gms., 200

gms. and 100 gms. to weigh the same. These facts stated by P.W.5 Gundu Naik has also been confirmed by P.W.4 Korgaonkar. It appears from the evidence of P.W.5 Naik that he had a weight of even 1 mg. in his kit box. The question then is what weight is to be given for the said less weight found by P.W.1 Kaissare i.e. difference of 10.6 gms ?

7. Shri Sardessai, the learned P.P. has submitted that it is possible that the weight got decreased by passage of time. In this connection, he relied upon the case of ***M.V. Dharman v. State of Kerala (2003 Cri.L.J. 1586)*** wherein the loss of weight of 0.63 gms. of ganja was presumed to be due to loss of moisture and therefore not a suspicious circumstance. He also submits that the weight by P.W.5 was recorded by using a goldsmith's scale while by P.W.1 recorded by using an electronic scale. In this context Shri Sardessai has relied on the decision of this Court dated 26.9.01 in Criminal Appeal No.16/01 in the case of Hilal Ahmed v. State of Goa wherein no much importance was attached to the difference in weight of 15 gms. of charas since the expert Shri M. Kaissare had weighed the contents on an electric balance and the difference was attributable to the balance used by the expert Shri Kaissare which was considered to be a sophisticated and sensitive balance. If the seizure was made on 23.10.01, the sample was weighed by P.W.1 Kaissare on 1.11.01 and I do not think in the absence of any plausible explanation that the weight of the substance could reduce in

such a brief period due to passage of time.

8. Shri Lobo points out that there is every possibility that the sample was interfered with and in this context Shri Lobo has referred to the letter dated 23.10.01 (Exh.16) wherein the sample envelope has been described as light green colour, while P.W.1 Kaissare has refered to the envelope as of whitish paper. I am not inclined to give much weight to the said description in colour. A whitish paper in the opinion of one could also be light green in the opinion of another person. Shri Lobo in support of the submission that the short weight found is an indication that there has been tampering has relied on the case of ***Rajesh Jagdamba Avasthi v. State of Goa (2004 Drugs Cases (Narcotics) 322)***, while Shri Sardessai has submitted that the fact that the seals were intact as found by P.W.1 Kaissare shows that the sample was not at all interfered with. Shri Sardessai has relied on the case of Rajesh J. Awasthi (1998 (2) Crimes 266).

9. The case of Rajesh J. Awasthi decided by the learned Bench of this Court and relied upon by Shri Sardessai appears to be the same case which was carried in appeal before the Supreme Court upon which reliance has been placed by learned Advocate Shri Lobo.

10. In the case of Rajesh Avasthi (supra) charas were recovered from the shoes of the accused and it was stated by the prosecution that from the shoe of the right foot 100 gms. were recovered and from the shoe of the left foot 115 gms. were recovered and the said substance was packed and sealed in two envelopes marked 'A' and 'B' respectively. The Jr. Scientific Officer found in envelope 'A' 98.16 gms. of charas while in envelope 'B' he found 82.52 gms. of charas. The High Court found that from envelope 'B' which was said to contain 115 gms. of charas, was found only 82.52 gms. of charas. But that could not be considered to be a minor discrepancy. The High Court was of the view that even if the sample contained in envelope 'B' was not considered against the accused on account of the said discrepancy in weight, the case against the accused was established on the basis of charas recovered, packed and sealed in envelope 'A'. It was submitted before the Hon'ble Supreme Court that this Court was not justified in upholding the conviction of the appellant on the basis of what was recovered from only envelope 'A' ignoring the quantity found in envelope 'B' because there was only one search and seizure and whatever was recovered from the accused was packed in two envelopes. The Hon'ble Supreme Court held that the credibility of the recovery proceedings got considerably eroded if it was found that the quantity actually found by P.W.1 was less than the quantity sealed and sent to him and the question was not how much was seized, but whether there was actually seizure and

what was seized was sent for chemical analysis to P.W.1 and since the prosecution was not able to explain the said discrepancy, the case of the prosecution was rendered doubtful.

11. In the case of ***Madan Lal and another v. State of Himachal Pradesh (2003 Cri.L.J. 3868)*** the Supreme Court had again an occasion to consider a case of reduction in weight of the sample sent for analysis. The Supreme Court stated that this aspect was considered by the trial Court which had recorded its reasons for rejecting the same and that it was noted that the seals were intact and there was no tampering and that view was endorsed by the High Court. The Supreme Court observed that on considering the reasoning indicated that there was very minimal and almost ignorable variation in weight, the Supreme Court found that there was no reason to interfere with the finding. Neither learned Advocate Shri Lobo nor the learned P.P. have been able to inform this Court as to what was the reduction involved in the said case of Madan Lal (supra) so as to consider the same as minimal but they have not been able to make any submission in that regard. In the case of Rajesh J. Avasthi (supra) the difference in weight in one of the samples was as much as 32.46 gms. That is not the case here. Considering that the difference in weight is less than 11 gms., i.e. 10.6 gms. the same ought to be considered as minimal and ignored as not creating any doubt in the credibility of the case of the prosecution. In my view the difference in weight in this case which is marginal or minimal

when compared to a sample which weighed 1.8 kgs. should not be used as a peg to hang the case of the prosecution, when otherwise the evidence led by the prosecution is cogent and reliable. It is quite probable that the marginal reduction in weight is due to the fact that the substances were weighed by P.W.1 Kaissare separately, and being an expert, on a sensitive scale, while the sample was weighed by P.W.5 Naik collectively on a different scale having pans. This is a case where there is evidence to show that after the seizure the seal with which the sample was sealed was retained by P.W.7 P.I. Banaulikar while the sample itself was given in the custody of P.W.6 Constable Umesh Shetgaonkar which he kept under his key and on the next morning he proceeded to hand over the same to P.W.2 Constable Chowgule who, in turn, with the letter of Dy.S.P. Bosco George handed over to the laboratory where P.W.1 Kaissare found it with seals intact and tallying with specimen impressions, sent separately. Since the seal used to seal the sample and the sample were not retained by one officer, is a fact which lends assurance that the sample which was analysed by P.W.1 Kaissare was the same that was seized from the accused. In my view the slight discrepancy in the weight of the sample should not be taken to doubt the case of the prosecution which was otherwise proved beyond reasonable doubt. The investigations and procedures followed in this case appear to be quite foolproof so as not to create any doubt regarding the veracity of seizure of charas from the accused.

11. In view of the above, I find there is no merit in this appeal and consequently the same is hereby dismissed.

N. A. BRITTO, J.

sl.